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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

ALICE BENNER, Administratrix of the Estate of William H. Benner, Deceased,
Respondent.

No. 897

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Missouri

and

BRIEF IN SUPPORT THEREOF.

CARLETON S. HADLEY,
WALTER N. DAVIS,
ARNOT L. SHEPPARD,
Attorneys for Petitioner.

302 Union Station,
St. Louis, Missouri.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1941.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Petitioner, vs. ALICE BENNER, Administratrix of the Estate of William H. Benner, Deceased, Respondent.	No. .....

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and to issue its writ of certiorari directed to the Supreme Court of Missouri (hereinafter referred to for convenience as the court below), directing it to send to this Court for review its opinion and judgment rendered and entered on October 30, 1941, rehearing in which was refused December 12, 1941, in this cause, lately pending in the court below, styled Alice Benner, Administratrix of the Estate of William H. Benner, deceased, respondent, v. Terminal Railroad Association of St. Louis, a Corporation, appellant, No. 37,598, on the docket of the court below, affirm-

ing a judgment of the Circuit Court of the City of St. Louis, Missouri, in said cause in favor of respondent and against your petitioner herein.

OPINION OF THE COURT BELOW.

The opinion of the court below in said cause of Alice Benner, Administratrix of the Estate of William H. Benner, Deceased, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, which is by this petition sought to be reviewed, appears on pages ... to ..., inclusive, of the printed transcript of the record filed herewith, but has not yet been published in advance sheets or bound volumes of Southwestern Reporter, or official reports of the Supreme Court of Missouri.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed, having been brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), the jurisdiction of this Court is based upon Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344, providing for review in this Court by certiorari of decisions of the highest courts of several states wherein a title, right, privilege or immunity especially set up are claimed under a statute of the United States. Authorities sustaining the jurisdiction are: Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 34 S. Ct. 635, 58 L. ed. 1062; Minneapolis, St. P. & S. S. M. R. Co. v. Goneau, 269 U. S. 406, 46 S. Ct. 129, 70 L. ed. 335; Gulf, M. & N. R. Co. v. Wells, 275 U. S. 455, 48 S. Ct. 151, 72 L. ed. 370; Atlantic Coast Line Co. v. Davis, 279 U. S. 34, 49 S. Ct. 210, 73 L. ed. 601; Steeley v. Kurn et al., 313 U. S. 256, 61 S. Ct. 934.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was commenced and maintained by the respondent under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65) to recover against petitioner damages sustained by her and her children as a result of the death of her husband, William H. Benner, on May 5, 1941, during his employment as a switchman of petitioner, from injuries sustained while in the scope of his employment. The claim is that on April 30, 1941, Benner, while talking over one of petitioner's telephone lines, received an electric shock which caused his death.

Respondent pleaded general negligence and relied upon res ipsa loquitur (R. 2, 3, 4).

On April 30, 1940, Benner alighted from his train for the purpose of telephoning yardmaster Jenkins for orders respecting the next train movement (R. 9). The telephone instrument which he was using was inside a box attached to a pole (R. 10, 17). At that time it was storming, thundering and lightning (R. 12).

While Benner was at the telephone instrument the locomotive engineer of his crew saw the receiver of the telephone drop (R. 13); but he at no time saw the telephone receiver in Benner's hand (R. 13). The engineer saw also that Benner's hands were hanging down, but he could not tell whether or not his arms were stiff (R. 17); Benner's eyes were bulging and although he had rather large eyes the engineer thought they looked somewhat larger than usual (R. 12); Benner's mouth was working, but because of the distance the engine was from Benner and the noise it was making the engineer could not tell whether or not Benner was talking and, if so, what he was saying. He could not have heard what Benner was saying even under

normal conditions, had there been no thunder or lightning storm (R. 12). Some three minutes afterwards the engineer saw Benner pick up the telephone receiver, but the engineer at no time, either before or after the telephone receiver dropped, saw Benner ring the telephone (R. 19).

However, the undisputed evidence of the yardmaster, Jenkins, is that upon that occasion Benner called him by telephone and received orders for the next movement of his train. During that conversation there was a clicking noise in the telephone, whereupon Benner asked yardmaster Jenkins if he had felt that, and upon being told by Jenkins that he had not felt anything decedent informed Jenkins that he (Benner) had received a shock (R. 125). There was but the one telephone conversation between decedent and Jenkins upon this occasion, and there was no appreciable break in it (R. 127).

Upon returning to the locomotive decedent asked the engineer, "Did you see the lightning strike the pole?" Upon receiving a negative answer decedent replied, "I got a shock" (R. 12). About forty-five minutes later decedent told switchman Nicholson that he had received a shock while using the telephone. Nicholson asked him if he had received the shock from the receiver, whereupon decedent replied, "Fire—fire come down the pole" (R. 135). He also told others that he had received a shock while telephoning (R. 133, 148). After he had been sent to a doctor decedent told the doctor that he had been talking over a telephone and that the wires had been struck by lightning (R. 108).

Within an hour or an hour and a half subsequent to the incident above described, Benner began to manifest symptoms of lack of nervous and physical control, such as difficulty of speech, movement, enunciation, etc. (R. 134, 138, 148). He was sent to a hospital, rapidly developed a com-

plete paralysis of the right side of the body, and died five days after the alleged electric shock (R. 9, 21).

The telephone which Benner used was equipped with a lightning arrester and fuses to protect the user from shock by electricity (R. 168, 169). This equipment was standard for that purpose (R. 169). In the lightning arrester there are two small carbons a short distance apart, which an electric spark must bridge and which leave marks upon the carbons the size and nature of which are determined by the severity of the electrical impulse. Examination of the carbons of the lightning arrester attached to this telephone disclosed a few minor burns (R. 168). These burns were described by respondent's expert witness as "incipient" (R. 238). This witness, upon his first examination of the carbons with the naked eye, could not discover any evidence whatever of the burns (R. 235), but upon examining the carbons with a magnifying glass found some "incipient" burns (R. 238).

A post morten was had upon the body of the decedent both by the Coroner's physician, as a matter of public duty, and by one Siebert, a pathologist for respondent. The former discovered a "minute, diffused, subarachnoid haemorrhage" in the occipital or rear portion of the brain (R. 30). This means a very small amount of haemorrhage, scattered through the area between two of the membranes covering the brain proper (R. 30) The coroner's physician found also that the brain was edematous, which means that there was an abnormal increase in the fluid content of the brain tissue, which he said was due to the haemorrhage just mentioned (R. 38). The coroner's physician further testified that the fact that Benner had this haemorrhage would not indicate "to the slightest degree" that he had received an electric shock (R. 46). He expressed the further opinion that a microscopic examination

accompanied by the use of special stains would not only disclose whether or not the brain had received an electric shock, but would even determine whether that shock was caused by direct or alternating current (R. 47). The testimony of respondent's other pathologist, Dr. Siebert, was to the effect that his post mortem disclosed a group of brain changes, which indicated electrocution (R. 52, 53). He admitted, however, on cross-examination, that each and all of these changes resulted from various causes other than electric shock (R. 66, 67, 68, 69). He stated also that in many electric death cases "no changes whatever are found in the body" (R. 51); and that "electric injuries can occur without any demonstrable changes in the brain and result in paralysis" (R. 72).

Petitioner's medical evidence disclosed that an examination of the microscopic slides prepared by respondent's expert Siebert did not disclose any evidence of electric shock (R. 177, 178, 179, 183, 185).

The undisputed evidence of petitioner's experts, both Dr. Harris and Dr. O'Leary, was to the effect that the haemorrhage found in decedent's brain had occurred not longer than twenty-four hours (R. 205), and possibly not longer than six hours prior to death (R. 183, 185). Respondent's pathologist Siebert testified that the haemorrhage had occurred before death, but did not state how long before (R. 69). He did say, however, that "areas of degeneration would show a body reaction against them in the five days" (R. 69).

Respondent's medical evidence further showed that the initial injury to the brain tissue, from which everything else, including death, resulted, was the subarachnoid haemorrhage, which directly produced the oedema and, in turn, all of the other pathological conditions (R. 37, 39, 40, 43, 44). The exact language of the coroner's physician is

that "in his opinion the haemorrhage in the brain caused all the other things that followed" (R. 44).

Respondent's theory necessarily is that the haemorrhage **immediately** followed the alleged electric shock. Her evidence is that (as above stated) the first step in the sequence was the haemorrhage; this blocked circulation in the brain and thus increased the fluid content of the brain (oedema), which in turn created intracranial pressure, followed by still further blocking of blood and liquid circulation, to such extent as to produce paralysis and death. The first symptoms of paralysis were evidenced within an hour or an hour and a half after the telephone incident (R. 134, 138, 148).

But petitioner's uncontradicted medical evidence shows as a medical fact (as distinguished from medical opinion) that nature always tries to reorganize haemorrhaged tissue within from six or twelve hours (R. 30, 183, 184, 185) to twenty-four hours (R. 203), because nature considers blood out of its regular channels a foreign substance, and within a few hours after its escape begins an effort to "reabsorb or take away that foreign substance" (R. 205). This principle is conceded by respondent's expert, Siebert, who says "these areas of degeneration would show a body reaction against them in the five days between this man's alleged injury and his death" (R. 68, 69).

At the time of Benner's alleged shock he was talking to yardmaster Jenkins, who not only was not injured, but was not even shocked (R. 125, 126, 127), although talking over a telephone instrument connected to the same wire as was the telephone instrument through which Benner was talking.

An examination of the telephone, fuses, lightning arrester, ground wire, etc., disclosed no defect whatever in any of them (R. 158, 168), nor any evidence that more than a very light charge of electricity had passed through

the telephone or its appurtenances; so light, in fact, that respondent's expert had to use a microscope to discover the burns on the carbons (R. 238).

The construction of the telephone instrumentality was, first, the telephone wire, next the fuses, next the lightning arrester, next the communication wire. Attached to the lightning arrester, but not to the telephone instrument, was a wire from the arrester to the ground plate (R. 151, 152), to which the arrester shunted any abnormal electrical charge.

The appurtenances were standard equipment (R. 150, 160, 168, 169). Respondent's electrical expert testified there "is a very much better block (lightning arrester) that has been on the market for—since 1924 or 1925" (R. 226). He refused, however, to state the arrester in use was obsolete (R. 232); and admitted the carbons in question did not disclose that any high voltage charge of electricity had passed through these carbons (R. 235). He had to use a magnifying glass to discover "incipient" burns on the carbons (R. 238), after having failed to see them when during his cross-examination he used no magnifying glass (R. 235).

It will be remembered that the first evidence of abnormality displayed by Benner was disturbed muscular function, rather than loss of consciousness. The undisputed evidence discloses that when the first manifestation of abnormality is disturbance of consciousness, the doctors think of a break in the wall of a blood vessel, but when paralysis or disturbed muscular function occurs first, they think of the blocking of a blood vessel (R. 92, 93), because, while both produce haemorrhage, the former is of greater extent and produces it in a very short time, while the latter is smaller in area and the symptoms slower in manifesting themselves. Respondent's theory of the cause of Benner's death is thrombosis or embolism in what is known as the internal capsule of the brain (R. 88, 89, 98).

The internal capsule is that portion of the brain near the center of the cerebrum and is no more than the particular section of the brain through which the nerve pathways of the surface of the brain (as distinguished from the covering membranes) pass and converge towards their connection with the spinal cord (R. 90). These nerves cross over to the opposite side of the body, so that the left half of the brain controls the right half of the body and vice versa (R. 90). In other words, the nerve centers which control certain bodily functions are scattered over the surface of the brain, but each finds a pathway towards the internal capsule through which they pass to the spinal cord. Necessarily, as they approach from the widely separated areas of the brain surface, they converge until they reach the spot where they are practically gathered into one bundle or mass. This point is the internal capsule.

The blocking of a blood vessel by a thrombus, embolus or haemorrhage in the internal capsule will, therefore, cause a much greater disturbance of bodily functions than would an injury of the same dimensions at some other portion of the brain where the nerve fibers are widely separated. In view of the failure of the evidence to show any injury to the surface nerve centers of the brain which control bodily movements, petitioner's medical experts were of the opinion that the trouble must have been in the internal capsule.

Neither Dr. Connor nor Dr. Siebert, respondent's medical experts, discovered any abnormality in the internal capsule (R. 31, 77). Dr. Connor stated that he saw grossly no abnormality in the internal capsule, but that he would not have seen it in any event, unless he had made a microscopic examination (R. 31). Dr. Siebert testified that he made no microscopic examination of internal capsular tissue (R. 64, 65), because his gross examination disclosed no abnormality and there was, therefore, no necessity for a microscopic examination (R. 77). Thus, we have one of respondent's experts saying that nothing but a microscopic exam-

ination would reveal an abnormality in the internal capsule, and the other says that because no abnormality could be seen by the naked eye, there was no necessity for the microscopic examination. Nevertheless, Dr. Siebert, expressed the opinion that the seat of the trouble was not in the internal capsule.

The undisputed evidence further showed that the areas of the brain surface controlling the physical movements of the body are located near the top, but in front of, a line drawn through the brain almost vertically, at approximately the middle, and not the occipital portion of the brain where the haemorrhage was found by Dr. Connor.

QUESTIONS PRESENTED.

I.

Whether in an action under the Federal Employers' Liability Act (U. S. C. A., Title 45, Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65), for damages for death, the res ipsa loquitur doctrine is applicable under any circumstances, for the reason that the action is one between employer and employee.

II.

Conceding the applicability of res ipsa loquitur, is petitioner's uncontradicted and undisputed evidence sufficient to overcome the factual inference created by res ipsa loquitur and to require a directed verdict for petitioner?

(a) Is respondent's evidence sufficient to show her decedent was killed by some form of electricity, either from:

(1) The medical evidence; or

(2) The factual evidence?

(b) If it is, is it sufficient to show the electricity reached Benner as a result of petitioner's negligence?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

By its opinion herein rendered October 30, 1941, the court below holds that res ipsa loquitur is applicable in a case prosecuted under the provisions of the Federal Employers' Liability Act. This is not a new holding of the court below. Williams v. St. L.-S. F. R. Co., 337 Mo. 667, 85 S. W. (2d) 624, 625; Noce v. St. L.-S. F. R. Co., 337 Mo. 689, 85 S. W. (2d) 637, 641.

This Court has (as we interpret its decisions) announced a contrary doctrine, and in later cases has said the application of the doctrine is disputable. Some of the Circuit Courts of Appeals have held the doctrine applicable in this character of cases, and some have held contra. There is the same contrariety of opinion among the highest state courts. Unquestionably there is serious disagreement on the question among the Circuit Courts of Appeals as well as the state courts of last resort. Necessarily this results in a situation which produces victory for one or the other of the parties litigant, depending not upon the law itself, but wholly upon the forum, one of the principal reasons this Court, in Erie R. Co. v. Tompkins, 304 U. S. 64, 82 L. ed. 1188, overruled Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865. This question is of great public importance because of the widespread enlargement of the res ipsa loquitur principle so as to include situations never formerly considered as sufficient to invoke the doctrine, and the uncertainty now existing as to its application. This should be remedied, and only this Court can do that.

II.

The medical evidence relied upon by respondent to show Benner died from electric shock is wholly insubstantial,

highly speculative, and upon analysis wholly fails to support respondent's theory. The sine qua non of liability is proof that the haemorrhage (claimed as the first happening in the sequence of events leading to death) occurred immediately following an electric shock. The evidence of petitioner shows the haemorrhage occurred at most not more than twenty-four hours before death, whereas the alleged electric shock occurred five days prior to death. Respondent has in no way denied this evidence.

III.

Respondent's evidence is wholly insufficient to show Benner received a fatal shock of electricity through the telephone: (1) The fuses were not blown, (2) the lightning arrester was not damaged, (3) the telephone was not rendered inoperative, and (4) the person in telephonic connection with Benner at the time it is claimed he (Benner) was shocked, was not only not injured, but felt no shock at all.

IV.

If it shall be conceded solely for the sake of argument that Benner received an electric shock through the telephone, the evidence of respondent is wholly insufficient to show that such shock resulted from petitioner's negligence. Petitioner's electrical evidence discloses that there is no known method of preventinng heavy charges of electricity from passing through a telephone instrument (R. 152, 160, 169). This is not denied by respondent's electrical witnesses. This condition, of course, applies especially with respect to preventing lightning from passing through a telephone instrument; but, of course, given the same voltage and amperage, from man-made electricity, the same result would necessarily follow. The evidence in this case introduced by petitioner negatives the idea that lightning struck the telephone instrument directly, whereas dece-

dent's own evidence supports the lightning theory. All of the evidence of both parties shows that if such had been the case, the damage to the telephone instrument and its appliances would have been very severe, whereas the uncontradicted evidence discloses that the telephone instrument operated normally for a long period subsequent to Benner's alleged shock. However, as above stated, Benner's own statements on the same evening that he is alleged to have been shocked indicated that he thought he had received a shock from lightning (R. 12, 108, 135).

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, addressed to the Supreme Court of Missouri, directing that Court to certify to this Court, on a day certain to be therein named, a full and complete transcript of the record of the proceedings in said cause of Alice Benner, Administratrix of the Estate of William H. Benner, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, that court's No. 37,598, to the end that said judgment of said Court may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Supreme Court of Missouri in said cause, dated October 30, 1941 (the petition for rehearing denied December 12, 1941), be reversed and that petitioner have such other relief as to this Court shall seem appropriate.

CARLETON S. HADLEY,
WALTER N. DAVIS,
ARNOT L. SHEPPARD,
Attorneys for Petitioner.